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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 998

ESTATE OF B. H. KROGER, Deceased, CHESTER F.
KROGER, IRVING W. PETTENGILL, RUDOLF
HOMAN and THE PROVIDENT SAVINGS BANK
AND TRUST COMPANY, Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF**

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C. CHESTER GUY,
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EDWARD J. QUINN.

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FOR THE SIXTH CIRCUIT**

To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

The Estate of B. H. Kroger, deceased, Chester F. Kroger, Irving W. Pettengill, Rudolf Homan and The Provident Savings Bank and Trust Company, Executors, by their attorneys, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered December 4, 1944, affirming the decision of The Tax Court of the United States entered November 17, 1943.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925, 43 Stat. 938.

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of The Tax Court of the United States upon the trial of the case is printed at pages 64-86 of the Record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, affirming the decision of The Tax Court of the United States, entered November 17, 1943 (R. 87), was handed down December 4, 1944, is printed at pages 250-263 of the Record and is reported in ... F. (2d)

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*.

QUESTIONS PRESENTED

Two questions are presented in this petition: (1) whether two transfers in trust made by B. H. Kroger on February 13, 1928, were made in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended, so as to require the value thereof to be included in the gross estate; and (2) alternatively, if the transfers were made in contemplation of death, whether only to the extent of the interest in the property then transferred, namely, .69565, is the value of the property, at date of death, includible in the gross estate.

STATEMENT OF THE CASE

This action was instituted in The Tax Court of the United States by the executors of the Estate of B. H. Kroger, deceased, filing a petition from a determination by the Commissioner of Internal Revenue of a deficiency in Federal estate tax of \$12,524,987.81 (R. 18).

B. H. Kroger was born on January 24, 1860, at Cincinnati, Ohio, where he resided continuously thereafter until his death on July 21, 1938 (R. 89). He was the founder of Kroger Grocery and Baking Company, its principal stockholder, president and director (R. 89). Kroger was also president and a director of one bank and a director of two others (R. 90).

Kroger's first wife died in 1899; to which marriage were born six children, all of whom were living in 1928, and some of whom had children of their own (R. 90, Ex. 7).

After the sale of his Kroger Grocery and Baking Company stock early in 1928 for \$24,397,000 cash (R. 90), the major portion of which he promptly invested in United States Government Securities (R. 140), and the gift of \$1,000,000 to each of his six children (R. 92), Kroger, then 68 years old and a widower (R. 79, 90), informed his son, Chester, that he planned to remarry; that he wanted to make a prenuptial agreement with his prospective wife because he did not want the bulk of his estate to go to her (R. 138); that he wanted his children and blood grandchildren to have the benefit of it (R. 138). Chester objected to a prenuptial agreement for fear of law suits, and he prevailed upon his father to create an irrevocable trust as a substitute for a prenuptial agreement (R. 137-139), resulting in Kroger executing two such trusts on February 13, 1928, to one of which he transferred \$10,000,000 and to the other \$2,000,000 in United States Treasury notes (Exs. 5-E and 3-C).

By the terms of each trust indenture, Kroger provided for payment to himself of the entire net income of the trust during the period of his life, for payment of the entire net income to his surviving children after his death, and for distribution of the corpus to his grandchildren upon the death of the survivor of his children (Exs. 5-E and 3-C).

At the time of the creation of the trusts, Kroger was in good health (R. 79); and the transfers were not motivated either because of any concern for his health or because of any purpose to avoid taxes (R. 79). He never mentioned to Chester the thought of death or the thought of a testamentary disposition of his estate (R. 117). Kroger married a Mrs. Maher, as he had theretofore planned, on March 3, 1928 (R. 71).

In his will, executed August 4, 1928, Kroger set up a testamentary trust for his wife, and provided in lieu thereof, that she should have the right to receive her statutory interest in his estate, if she so elected (Ex. 6-F). The making of the will was in no wise connected with the transfers here in question (R. 80).

The Tax Court stated in its Findings of Fact that the transfers were made by Kroger "for the purpose of barring his wife from any statutory rights in the transferred property in case the woman whom he was about to marry should survive him and were made in contemplation of death" (R. 74). In seeking Kroger's "dominant motive" in making the transfers the Tax Court stated in its Opinion: "He was contemplating marriage, not death. Marriage is associated with life" (R. 82). The Tax Court also stated in its Opinion that Kroger's "dominant motive" in making the transfers "was to bar his future wife from any statutory rights of dower which she might have in his estate, if she should survive him" (R. 83).

The trusts entitled Kroger during his life to the net income of the properties held in trust (Exs. 5-E and 3-C). His life expectancy, at age 68, at the time of the creation of the trusts was 9.47 years (R. 181), and his retained interests in the properties transferred in trust measured by his life expectancy was .30435 of the whole and the extent of the interests transferred by the trusts in the properties transferred in trust was .69565. ("Table A," of Section 81.10 of Estate Tax Regulations 105 and of Section 86.19 of Gift Tax Regulations 108.)

The Tax Court of the United States, having held that the interests in the trust properties transferred by trust by Kroger on February 13, 1928 were transferred by him in contemplation of his death, further held that the entire value of the trust properties at the date of his death was includible in gross estate rather than .69565 thereof (R. 85, 86).

The decision of the Tax Court of the United States was affirmed by the Circuit Court of Appeals for the Sixth Circuit (R. 263).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

(1) In affirming the decision of The Tax Court of the United States that the purpose of Kroger of barring his wife from any statutory rights in the transferred property in case the woman he was about to marry should survive him, is legally sufficient to bring the transferred properties into gross estate as transfers in contemplation of death within the meaning of Section 302(c) of the Revenue Act of 1926, as amended.

(2) In deciding that the transfers in trust were made in contemplation of death.

(3) Alternately, if the transfers in trust were made in contemplation of death, in deciding that more than .69565

of the value of the trust properties at date of death is includible in gross estate.

REASONS FOR GRANTING THE WRIT

(1) The Circuit Court of Appeals for the Sixth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

(2) The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal law, which has not been, but should be, settled by this Court.

CONCLUSION

Certiorari should be granted.

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